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No. 80-1074

In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD W. VELDE, ET AL., PETITIONERS

v.

NATIONAL BLACK POLICE ASSOCIATION, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

LAWRENCE G. WALLACE
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

PETER BUSCEMI
Assistant to the Solicitor General

ROBERT E. KOPP
BARBARA L. HERWIG
FREDERICK GEILFUSS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether federal officials are absolutely immune from personal damages liability for their decisions not to initiate administrative action to terminate federal funding to local government agencies that allegedly engage in discriminatory personnel practices.

2. Whether petitioners' failure to terminate federal funding to local government agencies that allegedly discriminate on the basis of race and gender gives rise to a cause of action for damages under the Fifth Amendment.

3. Whether petitioners are entitled to qualified immunity as a matter of law.

PARTIES TO THE PROCEEDING

The parties to this case are petitioners Richard W. Velde, Edward H. Levi, Charles R. Work, and Herbert C. Rice, and respondents National Black Police Association, Inc., Penelope Brace, Bruce Bailey, Kristen Heemstra, Ollie S. Glover, Joel Michelle Schumacher, Raymond Clark, Kent G. McKinney, Penny Orazetti, Roberta Ledyard, Robert Booth, William Harris, and Jennie McKinney.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 631 F.2d 784. The order of the district court (Pet. App. 28a-29a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24a-25a) was entered on May 14, 1980. A petition for rehearing was denied on August 1, 1980 (Pet. App. 27a). On October 21, 1980, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 29, 1980. The petition was filed on that date and was granted on May 4, 1981 (J.A. 495). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 509 of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 206, as reenacted by Section 2 of Pub. L. No. 93-83, 87 Stat. 211, codified at 42 U.S.C. (1970 ed., Supp. V) 3757, provided:

> Whenever the Administration, after reasonable notice and opportunity for hearing to an applicant or a grantee under this chapter, finds that, with respect to any payments made or to be made under this chapter, there is a substantial failure to comply with—
>
> (a) the provisions of this chapter;
>
> (b) regulations promulgated by the Administration under this chapter; or
>
> (c) a plan or application submitted in accordance with the provisions of this chapter;
>
> the Administration shall notify such applicant or grantee that further payments shall not be made (or in its discretion that further payments shall not be made for activities in which there is such failure), until there is no longer such failure.

3. Section 518(c) of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 208, as amended by Section 2 of Pub. L. No. 93-83, 87 Stat. 214, codified at 42 U.S.C. (1970 ed., Supp. V) 3766(c), provided:

> (1) No person in any State shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this chapter.

(2) Whenever the Administration determines that a State government or any unit of general local government has failed to comply with paragraph (1) of this subsection or an applicable regulation, it shall notify the chief executive of the State of the noncompliance and shall request the chief executive to secure compliance. If within a reasonable time after such notification the chief executive fails or refuses to secure compliance, the Administration shall exercise the powers and functions provided in section 3757 of this title, and is authorized concurrently with such exercise—

(A) to institute an appropriate civil action;

(B) to exercise the powers and functions pursuant to title VI of the Civil Rights Act of 1964 (section 2000d of this title); or

(C) to take such other action as may be provided by law.

(3) Whenever the Attorney General has reason to believe that a State government or unit of local government is engaged in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including injunctive relief.

STATEMENT

1. In 1968, Congress created the Law Enforcement Assistance Administration ("LEAA") in order to provide technical and financial assistance to local and state police departments. See Title I of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197-209, codified at 42 U.S.C. 3701 *et seq.*[1] The

[1] In 1979, Congress restructured LEAA, creating a National Institute of Justice, a Bureau of Justice Statistics, and an Office of Justice Assistance, Research, and Statistics. See Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167. These changes do not affect the legal issues presented in this case.

Act authorized the LEAA Administrator to make financial grants to state and local agencies in order to establish state and regional law enforcement planning agencies, to develop and acquire law enforcement equipment and methods, and to recruit and train law enforcement personnel. See 42 U.S.C. 3722-3725, 3731-3750. Pursuant to these provisions, LEAA distributed approximately $7.25 billion in federal funds to state and local agencies between 1969 and 1979. Such funds represent only a small percentage of the operating budget of any recipient police department.[2]

Section 518(c)(1) of the Act prohibits any recipient of LEAA funds from discriminating on the basis of "race, color, religion, national origin, or sex." 42 U.S.C. 3766(c)(1). At all times relevant to this litigation, Section 518(c)(2) provided that upon determining that a recipient of funds is discriminating in violation of the Act or LEAA's regulations, LEAA "shall notify the chief executive of the State of the noncompliance and shall request the chief executive to secure compliance." 42 U.S.C. (1970 ed., Supp. V) 3766(c)(2).[3] Section 518(c)(2) further stated that "[i]f within a reasonable time" LEAA cannot secure voluntary compliance, it "shall exercise the powers and functions provided in section [509]." 42 U.S.C. (1970 ed., Supp. V) 3766(c)(2).[4] Section 509,

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[2] For example, in 1974, the Philadelphia Police Department, which is discussed in respondents' complaint (J.A. 26-28), received a total of less than $800,000 in LEAA grants. The Department's total budget that year was almost $132 million. Thus, LEAA's grants accounted for approximately 0.6% of the 1974 Philadelphia Police Department's budget.

[3] In 1976, Section 518 was substantially amended. See Crime Control Act of 1976, Pub. L. No. 94-503, Section 122(b), 90 Stat. 2418. See also pages 22-24, *infra*.

[4] Section 518(c)(2) also authorized LEAA to institute other enforcement proceedings, including an appropriate civil action, to remedy the noncompliance. In addition, Section 518(c)(3) authorized the Attorney General to bring a civil action against a unit of state or local government to remedy any pattern or practice in violation of Section 518(c)(1).

in turn, provided that if, after notice and an opportunity for a hearing, LEAA finds that "there is a substantial failure to comply," it "shall notify such applicant or grantee that further payments shall not be made (or in its discretion that further payments shall not be made for activities in which there is such failure), until there is no longer such failure." 42 U.S.C. (1970 ed., Supp. V) 3757.[5]

2. In 1975, respondents, six blacks and six women and an organization that represents black police officers, filed this suit in the United States District Court for the District of Columbia, challenging LEAA's funding of state and local police departments that allegedly discriminated on the basis of race and gender. Respondents sought "to compel the defendants to terminate all funding to discriminatory law enforcement agencies, and in all other ways to enforce their constitutional and statutory civil rights obligations" (J.A. 13). Named as defendants were the Department of Justice, LEAA, and the four Department of Justice officials who are the petitioners in this Court: Attorney General Edward H. Levi, LEAA Administrator for Administration Richard W. Velde, LEAA Deputy Administrator Charles R. Work, and Director of LEAA Office of Civil Rights Compliance Herbert C. Rice. The four officials were sued in their individual and official capacities.

The individual respondents alleged that state and local police departments that had received and were receiving LEAA grants had discriminated against them.[6] Respondents further alleged that petitioners were re-

[5] Section 509 also was amended in 1976. See Crime Control Act of 1976, Pub. L. No. 94-503, Section 122(a), 90 Stat. 2418.

[6] Included among the state and local law enforcement agencies that were alleged to have discriminated against respondents were the police departments of Philadelphia; Des Moines, Ames, and Newton, Iowa; Richmond and Oakland, California; New Orleans; Portland, Oregon; Wayne County, Michigan; Honolulu; and the State of Indiana (J.A. 26-41).

sponsible "for insuring that LEAA funds are not used in a racially or sexually discriminatory manner by recipients of LEAA funding and for enforcing LEAA's constitutional and statutory civil rights obligations" (J.A. 16), and that petitioners' failure to terminate funding to these discriminatory agencies in accordance with Sections 509 and 518 of the Act violated respondents' statutory and constitutional rights by "serv[ing] to finance and thus to perpetuate the discriminatory and exclusionary employment practices of LEAA recipients" (J.A. 26). Respondents sought injunctive and declaratory relief against LEAA and the Department of Justice and $20 million in compensatory and punitive damages from petitioners (J.A. 43-45).

The government moved to dismiss the case or, in the alternative, for summary judgment (J.A. 234-235). In particular, petitioners contended that respondents lacked standing to challenge the refusal to terminate federal funding and that respondents' complaint failed to state a claim upon which relief could be granted. Alternatively, petitioners sought summary judgment on the ground that there was "a rational basis" for the way in which they carried out LEAA's civil rights compliance responsibilities (J.A. 234).[7] Petitioners further argued that they were entitled to official immunity with regard to respondents' claim for damages.[8]

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[7] In support of this motion, petitioners submitted a document prepared by petitioner Velde and entitled "Statement of Reasons—Explanation of LEAA's Role and Activity in Civil Rights Compliance." This document, which was incorporated in petitioner Velde's affidavit (J.A. 243), is reproduced at JA 265-303).

[8] The government also contended that the Crime Control Act of 1976, Pub. L. No. 94-503, Section 122, 90 Stat. 2418, had rendered respondents' claims for injunctive and declaratory relief moot. The district court agreed (Pet. App. 28a-29a), but the court of appeals reversed on this point (*id.* at 3a-4a, 8a). We have not sought review of this aspect of the court of appeals' decision, and further proceedings in the district court concerning respondents' claims for declaratory and injunctive relief have been postponed pending this Court's resolution of the present controversy.

On December 8, 1976, the district court dismissed the complaint, relying on *Barr* v. *Matteo*, 360 U.S. 564 (1959). The court stated that petitioners' "challenged actions * * * clearly fall within the outer perimeter of the line of their official duties * * * [and that c]onsequently [respondents'] claims for monetary damages against the defendants in their individual capacities are barred by the doctrine of official immunity" (Pet. App. 28a-29a).[9]

A divided panel of the court of appeals reversed. The court of appeals recognized that in *Butz* v. *Economou*, 438 U.S. 478, 508-517 (1978), this Court established that administrative officials who perform prosecutorial functions are absolutely immune from personal damages liability (Pet. App. 5a). The court concluded, however, that petitioners "have virtually no discretion under the relevant statute in deciding whether to terminate LEAA funding of discriminatory recipients" (*id.* at 6a). Be-

[9] As we discuss in greater detail below (see pages 23-26, *infra*), the record shows that petitioners had very different roles and responsibilities regarding LEAA funding. Petitioner Levi was not involved in the day-to-day decisions regarding LEAA funding, although, as Attorney General, he did have general authority over LEAA. Moreover, several employment discrimination suits were initiated against major police departments or agencies while he was Attorney General (J.A. 247-250). Similarly, although petitioner Velde delegated most responsibility for civil rights compliance to the Director of the Office of Civil Rights Compliance, he did engage in several attempts to secure voluntary compliance and initiated and participated in various programs designed to increase civil rights compliance and awareness among LEAA funding recipients (J.A. 236-243, 265-303). Petitioner Work's only direct contact with LEAA's civil rights compliance efforts concerned his promulgation of regulations prohibiting discrimination and his role in aiding respondent Brace in her suit against the Philadelphia Police Department (J.A. 251-254). Finally, petitioner Rice had primary responsibility for promulgating and enforcing LEAA's civil rights regulations and guidelines, and he exercised broad discretion in allocating prosecutorial resources and in choosing appropriate methods to effectuate LEAA's civil rights compliance program (J.A. 262-264).

cause, in the court's view, "[t]he minimal matters left to LEAA's judgment * * * do not rise to the level of prosecutorial discretion that is protected by absolute immunity" (*ibid.*), petitioners are entitled merely to a qualified immunity with regard to their decisions not to terminate LEAA funding (*id.* at 6a-7a). Declining to address petitioners' arguments that their failure to terminate funding did not give rise to a cause of action for damages under the Due Process Clause and that in any event the record before the district court established petitioners' entitlement to a qualified immunity, the court of appeals remanded for trial.[10]

Judge Tamm dissented on the ground that petitioners are entitled to absolute immunity. Judge Tamm observed that the absolute immunity recognized in *Economou* for officials who initiate administrative proceedings must apply as well to those who decline to move forward with such proceedings (Pet. App. 16a-17a). Otherwise, he explained, the existence of a one-sided immunity would create an unwarranted and improper bias in favor of prosecution (*ibid.*). Judge Tamm further concluded that petitioners' decisions to seek voluntary compliance rather than to initiate fund termination proceedings are "exactly what the Supreme Court had in mind when it spoke of functions 'analogous to those of a prosecutor' " (*id.* at 17a, quoting *Butz* v. *Economou*, *supra*, 438 U.S. at 515).

In addition, Judge Tamm disagreed with the majority's conclusion that petitioners lacked discretion regarding the termination of funding under Sections 509 and 518 of the Act (Pet. App. 17a-20a). Noting that Congress

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[10] The court of appeals also held that respondents had sufficiently alleged standing (Pet. App. 7a n.16). Judge Tamm agreed that respondents "have standing adequate to survive a motion to dismiss" (*id.* at 8a), although he expressed substantial doubt whether respondents would actually be able to prove that petitioners' conduct had caused respondents' alleged injuries or that the relief requested would redress the injuries claimed (*id.* at 8a-14a).

had amended those provisions in 1976 precisely because it believed that LEAA had too much discretion (Pet. App. 20a), Judge Tamm observed that the Act required petitioners to determine (1) whether a recipient was discriminating, (2) whether the recipient or the state was attempting to comply voluntarily within "a reasonable time," (3) whether the failure to comply was "substantial," and (4) whether a partial or complete fund termination was appropriate (*id.* at 17a-20a).

SUMMARY OF ARGUMENT

I

A. Petitioners are entitled to absolute immunity because they performed functions analogous to those of a prosecutor. In *Butz* v. *Economou*, 438 U.S. 478, 515-516 (1978), this Court recognized that government officials who must decide whether to initiate administrative proceedings play a role similar to that of a prosecutor who must decide whether to press criminal charges. For this reason, the Court held that administrative officials, like a prosecutor, are entitled to absolute immunity from damages liability based on their prosecutorial decisions. See *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). This immunity is essential to ensure that officials may exercise their discretion in deciding whether to commence administrative enforcement action free from the intimidation or influence inevitably associated with the possibility of civil liability in the event their decisions prove unpopular or wrong.

The absolute immunity recognized in *Economou* and *Imbler* must apply whether the official's decision is to proceed with administrative enforcement action or to eschew a particular enforcement method. Otherwise, if the immunity applied only when the decision was in favor of administrative action, it would skew the official's exercise of his discretion in the direction of initiating enforcement proceedings in every close or controversial

case. If, for example, a prosecutor knew that he would be immune from civil liability if he sought an indictment and proceeded to trial but not if he decided that prosecution was not warranted, the partial immunity might well influence prosecutors to resolve doubtful cases in favor of prosecution.

Here, petitioners' decisions concerning whether to pursue funding termination as a response to allegations of illegal employment discrimination by law enforcement agencies receiving LEAA funds are entitled to the absolute immunity recognized in *Economou* and *Imbler*. Contrary to the court of appeals' assertion, petitioners exercised substantial discretion in deciding whether and under what circumstances to invoke the funding termination option against particular recipients of federal funds. Petitioners were required to evaluate, *inter alia*, the nature and extent of the alleged noncompliance with statutory nondiscrimination guarantees, the likely efficacy of various administrative or judicial measures for eliminating any discrimination that did occur, and the potential effects on local law enforcement if LEAA funds were terminated. These are precisely the kinds of official judgments that require the protection recognized in *Economou* if they are to be made with freedom from the fear of possible civil liability.

B. Notwithstanding respondents' contrary submission, the relevant provisions of the amended Omnibus Crime Control Act, Sections 509 and 518, did authorize petitioners to make discretionary decisions concerning when to seek funding termination as a result of discriminatory action by a recipient agency. The use of the word "shall" in Sections 509 and 518 was not meant to impose a mandatory duty to institute fund termination proceedings any more than the word "shall" in various criminal statutes obliges the United States Attorney to seek an indictment in every case where the facts would sustain a conviction. Moreover, even if respondents are correct about the meaning of "shall" in these provisions of the

Act, petitioners, as the responsible Department of Justice officials, still had to exercise significant discretion before the supposed command of the statute even became applicable. Petitioners were required to determine, before any funding termination could occur, (i) that a particular recipient agency was not in compliance with the Act's anti-discrimination provisions, (ii) that notification of the Governor of the state involved had not secured compliance within a reasonable time, and (iii) that the noncompliance was sufficiently substantial to justify partial or complete funding termination under Section 509. All of these are discretionary judgments for which petitioners are entitled to absolute immunity.

C. The role of the different petitioners with respect to the LEAA civil rights enforcement process varied, but to the extent that each petitioner was involved at all in the matters addressed in respondents' complaint, he performed functions analogous to those of a prosecutor. The duties of each petitioner in this regard are described in the uncontradicted affidavits filed by petitioners in the district court and in the detailed "Statement of Reasons" accompanying petitioner Velde's affidavit. These materials, summarized in the text at pages 23-26, *infra*, show that the involvement of each petitioner in the LEAA compliance program resembled the typical discretionary conduct of a prosecutor, either in the formulation of overall enforcement policy, or in the application of that policy to particular cases, or both. Each petitioner, therefore, is entitled to absolute immunity for his part in the events of which respondents complain.

II

A. Respondents' request for damages should be dismissed, because the complaint does not state a claim on which relief can be granted. Respondents' grievance principally concerns alleged racial and sexual discrimination by law enforcement agencies receiving LEAA funds. But the complaint does not accuse petitioners of causing

this discrimination, participating in it, or purposefully encouraging it to continue. Rather, respondents seek to recover substantial compensatory and punitive damages solely because of petitioners' failure to initiate funding termination proceedings in response to the alleged discrimination. This assertion does not state a cause of action under the Due Process Clause of the Fifth Amendment.

In order to establish that official government action violated the Fifth Amendment, a plaintiff must prove not only a discriminatory effect but also an improper discriminatory purpose. See, *e.g.*, *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). Here, respondents have not alleged that petitioners intended to assist law enforcement agencies in their discriminatory practices, and the record contains no evidence of such an impermissible purpose on the part of any petitioner. To the contrary, the record establishes that petitioners took extensive actions in an effort to eliminate discrimination by recipients of LEAA funds. In the absence of any factual allegation suggesting that petitioners' failure to institute fund termination proceedings as a method of securing compliance occurred "because of," rather than "in spite of," its supposed adverse effects on respondents, the claim for damages should be dismissed. *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979).

B. Respondents' complaint also is deficient because it fails to allege an adequate causal connection between petitioners' actions and respondents' injury. See, *e.g.*, *Martinez* v. *California*, 444 U.S. 277 (1980); *Rizzo* v. *Goode*, 423 U.S. 362 (1976). Respondents allegedly were the victims of discriminatory practices by LEAA-funded agencies. They have not explained, however, how this injury is directly attributable to petitioners' failure to initiate funding termination proceedings. "Grants of federal funds generally do not create a partnership or joint venture with the recipient, nor do they serve to convert the acts of the recipient from private acts to

governmental acts absent extensive, detailed, and virtually day-to-day supervision." *Forsham* v. *Harris*, 445 U.S. 169, 180 (1980).

Respondents have made no specific factual allegations concerning a relationship between the alleged discriminatory practices and petitioners' civil rights compliance program. They can only speculate about how changes in that program might have affected the conduct of agencies receiving LEAA funds. Particularly in view of the fact that LEAA grants typically comprised only a small percentage of a recipient agency's total annual budget, such speculation is an inadequate ground on which to base a damages claim against federal officials. See *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976).

III

At a minimum, petitioners are entitled to qualified immunity as a matter of law. Under this Court's decisions in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), and *Butz* v. *Economou*, *supra*, government officials charged with constitutional violations may invoke a qualified immunity if they acted with a reasonable, good-faith belief that their actions were lawful. In the present case, the record plainly shows that petitioners made extensive efforts to enforce the antidiscrimination provisions of the Act. Petitioners' undisputed affidavits, including the "Statement of Reasons" and its appendix, demonstrate that LEAA continually pursued a wide-ranging civil rights enforcement program throughout the period covered by the complaint. Petitioners had no reason to believe that they were acting unreasonably in selecting "[c]ooperation and voluntary compliance * * * as the preferred means for achieving [the] goal" of eliminating employment discrimination. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

Moreover, no previous decision of this Court or any court of appeals has held that, by failing to terminate

funds to local agencies that discriminate on the basis of race or sex, federal officials violate the constitutional rights of those who are the victims of the discrimination. Nor have respondents suggested any other source from which petitioners could have learned that their preference to pursue, in the first instance, enforcement methods less drastic than funding termination violated respondents' constitutional rights. Finally, at the time of the acts alleged in the complaint, it was not even "clearly established" (*Wood* v. *Strickland*, 420 U.S. 308, 322 (1975)) that the height and weight requirements and written examinations used by many local police departments violated equal protection principles. In these circumstances, the only conclusion that can be supported by the record is that petitioners acted in a reasonable, good-faith belief that their conduct was lawful. They are, accordingly, entitled to qualified immunity as a matter of law.

ARGUMENT

I. FEDERAL OFFICIALS ARE ABSOLUTELY IMMUNE FROM PERSONAL DAMAGES LIABILITY FOR THEIR DECISIONS NOT TO INITIATE ADMINISTRATIVE ACTION TO TERMINATE FEDERAL FUNDING TO LOCAL GOVERNMENT AGENCIES THAT ALLEGEDLY ENGAGE IN DISCRIMINATORY EMPLOYMENT PRACTICES

A. In *Butz* v. *Economou*, 438 U.S. 478 (1973), this Court held that federal officials charged with unconstitutional acts ordinarily have only a qualified immunity from damages liability, dependent on proof that they acted reasonably and in good faith. The Court also held, however, that certain functions exercised by executive officials require a full exemption from liability, "where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Id.* at 507. In particular, the Court held that just as absolute immunity is required to protect officials who prosecute criminal cases (*Imbler* v. *Pachtman*, 424 U.S. 409 (1976); see also

Ferri v. *Ackerman*, 444 U.S. 193, 202-205 (1979)), similar protection is necessary for officials who institute administrative proceedings (438 U.S. at 515-516):

> We * * * believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought.
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> * * *
>
> The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete. * * * * *
>
> We believe that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment.

Although *Economou* concerned an administrative decision to bring charges, the Court left no doubt that the same protections must apply to administrative decisions not to initiate a proceeding: just as a criminal prosecutor has absolute immunity "in deciding what suits to bring" (*Imbler* v. *Pachtman*, *supra*, 424 U.S. at 424), so too an administrative official may not be held personally liable for determining "whether a proceeding should be brought" (*Butz* v. *Economou*, *supra*, 438 U.S. at 515). In the absence of such protection, a significant bias would be introduced into the official's decisionmaking process. The incentive would be strong to resolve close questions in favor of the commencement of administrative action, in order to minimize the potential for civil damages liability in the event of an error. *Ibid.* See

also *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 426 n.24, 431 n.33; *Yaselli* v. *Goff*, 12 F.2d 396, 404-406 (2d Cir. 1926), aff'd mem., 275 U.S. 503 (1927).

As Judge Tamm commented in his dissenting opinion (Pet. App. 16a-17a), the imposition of personal damages liability on an administrative official for failing to begin an enforcement proceeding would substantially eviscerate the discretion that the absolute immunity recognized in *Economou* is designed to protect. The determinations whether, or how, to enforce a particular statute in a particular context, whether to decline enforcement, or whether to institute a proceeding but to limit the charges or to seek only certain types of relief, are inextricably interrelated aspects of the same decisionmaking process. Cf. *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 249 (1980). The nature of a government official's inquiry and deliberations remains the same regardless of the outcome of the decisional process. A rule that would fully protect decisions to prosecute but would extend only qualified immunity to decisions not to prosecute would distort the exercise of prosecutorial discretion in favor of prosecution. See *Butz* v. *Economou*, *supra*, 438 U.S. at 515; *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 426 n.24. An official fearful of the personal consequences of his prosecutorial decisions could protect himself fully only by instituting full-scale proceedings on every complaint that comes before him, regardless of merit. Particularly in doubtful, close, or controversial cases, prosecutors would be unable to exercise their responsibilities "free from intimidation or harassment" (*Butz* v. *Economou*, *supra*, 438 U.S. at 516), and the result would be not "principled and fearless decision-making but * * * intimidation." *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967).

The present litigation is based on LEAA's alleged failure to take action to enforce statutory civil rights provisions applicable to its grantees. The gist of the complaint with respect to the four petitioners is that they failed to institute proceedings to terminate LEAA fund-

ing to recipient agencies that were allegedly discriminating against respondents. The claims against the petitioners relate directly to the decisions they made in choosing the means to achieve compliance—whether by voluntary means, judicial action, or resort to formal fund termination proceedings. Indeed, the allegations of respondents' complaint highlight the kinds of difficult prosecutorial decisions that generally confront federal officials who are responsible for enforcing the various funding termination statutes. Respondents alleged that petitioners had relied too heavily on ineffective attempts to secure voluntary compliance and had pursued legal remedies other than the drastic measure of terminating LEAA funding. See J.A. 27-28, 36-38.[11] In addition, respondents asserted that petitioners had declined to investigate or initiate fund termination suits because the discrimination alleged was de minimis or uncertain in nature or because the grantee was already involved in litigation or subject to a court order designed to secure compliance. See J.A. 31-36, 39-41.[12]

Regardless of whether petitioners' judgment on these matters might be viewed by others as correct, their decisions concerning the allocation of prosecutorial resources and the exercise of prosecutorial discretion are precisely the kind of decision-making that the Court has

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[11] For example, the complaint alleges that petitioners made "unsuccessful efforts to achieve voluntary civil rights compliance from the Philadelphia Police Department" (J.A. 27) and that, although petitioners formally referred this matter to the Civil Rights Division of the Department of Justice for legal action, they failed to initiate funding termination proceedings (J.A. 27-28).

[12] Prosecutors, of course, enjoy absolute immunity with regard to the decision whether or not to investigate as well as whether or not to commence formal judicial proceedings. See, *e.g.*, *Marrero* v. *City of Hialeah*, 625 F.2d 499, 505-506 n.8 (5th Cir. 1980); *Lee* v. *Williams*, 617 F.2d 320 (2d Cir. 1980); *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1212-1214 (3d Cir. 1979), cert. denied, No. 79-1120 (June 29, 1981). Cf. *Kipps* v. *Ewell*, 538 F.2d 564, 566 (4th Cir. 1976).

sought to insulate from the intimidation and distortion that accompanies the possibility of personal damages liability. See *Butz* v. *Economou*, *supra*, 438 U.S. at 515-516; *Ferri* v. *Ackerman*, *supra*, 444 U.S. at 202-204. See also *United States* v. *Lovasco*, 431 U.S. 783, 791-795 (1977).[13] A qualified immunity, which would often necessitate an inquiry into the prosecutor's motivations and the intimate details of his decisionmaking process, would plainly "disserve the broader public interest * * * [by] prevent[ing] the vigorous and fearless performance of the prosecutor's duty * * *." *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427.

B. The court of appeals nonetheless held that petitioners are not entitled to absolute immunity, because, in the court's view, petitioners had "virtually no discretion under the relevant statute in deciding whether to terminate LEAA funding of discriminatory recipients" (Pet. App. 6a). This is incorrect. As Judge Tamm observed (*id.* at 17a-20a), Sections 509 and 518, like numerous other statutes governing the termination of federal funding, require the exercise of substantial administrative discretion.[14] Indeed, because the cutoff of fed-

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[13] We do not suggest that an administrative prosecutor's decisions are immune from judicial review altogether. In appropriate circumstances, an administrative decision may be subject to limited judicial review. See, *e.g.*, *Marshall* v. *Jerrico, Inc.*, *supra*, 446 U.S. at 249; *Cannon* v. *University of Chicago*, 441 U.S. 677, 707 n.41 (1979); *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). But such injunctive or declaratory actions are a far cry from the personal damages suit presented here. See *Dennis* v. *Sparks*, No. 79-1186 (Nov. 17, 1980), slip op. 7.

[14] As indicated above, Congress amended Sections 509 and 518 in 1976, after the commencement of this suit. See Crime Control Act of 1976, Pub. L. No. 94-503, Section 122, 90 Stat. 2418; Pet. App. 7a n.16, 20a-21a n.16. Those amendments do not affect the issues presented by this case. We further note that the pre-1976 versions of Sections 509 and 518 are typical funding termination provisions. See, *e.g.*, Comprehensive Employment and Training Act of 1973, 29 U.S.C. (Supp. II) 834(b), 816(c); Title VI of the Civil Rights Act

eral funds may often cause serious dislocation and harm to innocent third parties, federal officials, including petitioners, have traditionally enjoyed broad authority to decide whether and when to initiate fund termination proceedings or to take other remedial administrative action.[15] Cf. *Marshall* v. *Jerrico, Inc.*, *supra*, 446 U.S. at 248-249.

Sections 509 and 518, like other funding termination provisions (see note 14, *supra*), vest broad enforcement discretion in the appropriate Justice Department officials. At a minimum, just as a prosecutor must decide whether the evidence supports a criminal charge, so too petitioners needed to make an initial determination whether a recipient of LEAA funding "ha[d] failed to comply with" the nondiscrimination provision of the statute and the accompanying LEAA regulations.[16] See 42 U.S.C. (1970 ed., Supp. V) 3766(c)(2).[17] Cf. *Dunlop* v. *Bachowski*, 421 U.S. 560, 571 (1975). In addition, after notifying the grantee state's governor of the noncompliance, pe-

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of 1964, 42 U.S.C. 2000d-1; Housing and Community Development Act of 1974, 42 U.S.C. 5309, 5311(a); Urban Mass Transit Act, 49 U.S.C. (Supp. II) 1615.

[15] Application of this principle is especially appropriate in the employment discrimination context, where this Court has emphasized the strong congressional policy favoring "[c]ooperation and voluntary compliance * * * as the preferred means for achieving" the statutory goal. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

[16] That determination ordinarily entails consideration of a complex variety of factors, including recruitment efforts, size and characteristics of the applicant pool, and legal adequacy of preselection testing procedures.

[17] Sections 509 and 518 focus on LEAA's authority and responsibilities rather than the responsibility of the individual federal officials. Petitioners as a group generally exercised this authority and responsibility, although their roles in or regarding LEAA were quite different. See note 9, *supra*, and pages 25-28, *infra*.

titioners had broad discretion to determine whether "within a reasonable time" the governor or LEAA grantee had taken appropriate steps to comply voluntarily. See 42 U.S.C. (1970 ed., Supp. V) 3766(c)(2). Moreover, because funding termination could be predicated only on a showing of "substantial" noncompliance (42 U.S.C. (1970 ed., Supp. V) 3757), petitioners could not properly commence a funding termination proceeding even after exhausting voluntary methods of compliance unless they concluded that the evidence would show a substantial violation. Finally, Sections 509 and 518 plainly authorized petitioners to pursue various different enforcement remedies, including partial as well as complete funding termination. See 42 U.S.C. (1970 ed., Supp. V) 3757, 3766(c)(2) and (3).

Furthermore, we submit that petitioners had discretion to decline commencement of a fund termination proceeding even though the evidence may have indicated that a grantee was engaged in substantial discrimination. Such discretion necessarily includes the determination whether the investment of resources likely to be required to pursue such legal action successfully could be justified in light of the number and importance of competing claims on LEAA and Department of Justice efforts. In the criminal law enforcement area, there is general recognition that "[f]unding levels determine how many cases can be brought and inevitably force prosecutors' offices to give little or no attention to many chargeable crimes. Limited funding may also preclude some complex, costly investigations and prosecutions." Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1542-1543 (1981).

To be sure, Section 518(c)(2) states that "[i]f within a reasonable time after such notification the chief executive [of the grantee state] fails or refuses to secure compliance, the Administration *shall* exercise the powers and functions provided in section [509]." 42 U.S.C. (1970 ed., Supp. V) 3766(c)(2) (emphasis added). But

most provisions for enforcement of the criminal law, including 28 U.S.C. 547, which provides that the United States Attorneys "*shall* * * * prosecute for all offenses against the United States," are also written in mandatory terms.[18] It is nonetheless well settled that a federal prosecutor has broad discretion, unreviewable by the judiciary, not to prosecute even if there is substantial evidence of guilt. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Newman* v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.); *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965). Likewise, this Court has repeatedly observed that administrative prosecutors possess similarly broad discretion notwithstanding the seemingly mandatory language of the particular statutory scheme. See, *e.g.*, *Marshall* v. *Jerrico, Inc.*, *supra*, 446 U.S. at 248; *Dunlop* v. *Bachowski*, *supra*, 421 U.S. at 571-573; *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413-414 (1958).

The legislative history of the Act confirms that petitioners possessed substantial discretion with regard to the initiation of funding termination proceedings. When the antidiscrimination provision at issue in this case, Section 518(c), was added to Title I of the Act in 1973, Section 509 was reenacted without change. The funding termination provision that petitioners were allegedly obliged to invoke was thus identical to Section 509 as originally enacted in 1968. Section 509, in other words, was couched in "mandatory" terms, before any prohibition against discrimination ever appeared in the Act. From the beginning, however, Congress made plain that the use of the word "shall" was not intended to cabin the authority of the responsible administrative officials.

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[18] The typical federal criminal statute provides that whoever commits a prohibited act *shall* be punished. See, *e.g.*, 18 U.S.C. 371, 1001.

The House Report accompanying the 1968 legislation explained that "the Attorney General *may* terminate or suspend payments * * * on a finding [that] there is a substantial failure to comply" with any provision of the statute and that he has "broad discretionary power" over the funding termination process. H.R. Rep. No. 488, 90th Cong., 1st Sess. 14, 26 (1967) (emphasis added). See also S. Rep. No. 1097, 90th Cong., 2d Sess. 85-86 (1968).

In amending the Act in 1973, Congress did not divest LEAA of its broad discretion. On the contrary, the pertinent legislative history shows that the LEAA funding termination provisions were patterned after the discretionary cutoff provisions in Title VI of the Civil Rights Act and various revenue sharing statutes and that it therefore was not intended that LEAA funding would automatically be suspended merely because a grantee had engaged in discrimination. See, *e.g.*, 119 Cong. Rec. 19702 (1973) (remarks of Rep. Rodino) ("the bill reiterates the antidiscrimination requirements of title VI of the Civil Rights Act of 1964, but also prohibits discrimination on the basis of sex. The bill strengthens the ban on discrimination by making clear that the fund cutoff provisions of Section 509 of the act and of title VI of the Civil Rights Act of 1964 both apply, and that appropriate civil actions may be filed by [LEAA], and that 'pattern and practice' suits may be filed by the Attorney General"); *id.* at 20097 (remarks of Rep. Jordan); *ibid.* (remarks of Rep. Hutchinson); *id.* at 22045 (remarks of Sen. McClellan); *id.* at 22075 (remarks of Sen. Javits); *Amendments to Title I (LEAA) of the Omnibus Crime Control and Safe Streets Act of 1968: Hearing Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 183 (1973).[19] Indeed, Congress again

[19] The statement by Representative Jordan on which respondents rely in their Brief in Opposition (Br. 16 n.15) is not inconsistent with this position. Contrary to the impression that respondents

amended Sections 509 and 518 in 1976, after the events alleged in respondents' complaint had occurred, precisely because it thought that LEAA retained too much

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attempt to convey, Representative Jordan was not addressing the alleged contrast between the funding termination provisions in Title VI and those in the Act, labelling the former discretionary and the latter mandatory. Rather, she was explaining the difference between the House bill's antidiscrimination provision, which she supported, and the comparable provision contained in the bill proposed by the Nixon Administration. Compare Section 518(b)(2) of the amended Act proposed in H.R. 8152, 93d Cong., 1st Sess. (1973), with Section 308(b) of the amended Act proposed in S. 1234, 93d Cong., 1st Sess. (1973), reprinted respectively in the *Senate Hearing*, *supra*, at 132 and 39-40. The Administration bill would have listed exercise of the funding termination powers provided in Section 509 of the Act as merely one of the available enforcement options that LEAA could choose if notification of a grantee state's governor failed to secure compliance within a reasonable time. The House bill, by contrast, and Representative Jordan's remarks in support of it, were intended to make clear, not that LEAA officials and the Attorney General lacked discretion in their enforcement of the Act, but that the funding termination procedure set forth in Section 509 was to be regarded as the preferred enforcement device, one ordinarily to be employed with or before other enforcement options. This is the same point made in the Conference Committee Report explaining the adoption of the House bill's approach in this regard. H.R. Conf. Rep. No. 93-401, 93d Cong., 1st Sess. 32 (1973). And, in any event, even if respondents' interpretation of Representative Jordan's remarks is correct, there remains the fact that, before the so-called mandatory provisions of Section 518(c)(2) would have come into play, LEAA would first have had to make the discretionary determinations that a state or local recipient agency was not in compliance with the Act's antidiscrimination provisions, that notification of the state's governor had not secured compliance within a reasonable time, and that the noncompliance was sufficiently substantial to justify partial or complete funding termination under Section 509. See pages 19-20, *supra*. In short, Representative Jordan's remarks, even if read as respondents suggest (and even if reflective of the will of Congress as a whole; see *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980)), do not negate the proposition that petitioners possessed broad discretion in their administration of the Act's antidiscrimination provision.

discretionary authority. See, *e.g.*, H.R. Rep. No. 94-1155, 94th Cong., 2d Sess. 11, 25-27 (1976); 122 Cong. Rec. 28498 (1976) (remarks of Rep. McClory).

Respondents acknowledge that this Court in *Economou* recognized an absolute immunity for administrative officials who exercise civil enforcement responsibilities analogous to those of prosecutors (Br. in Opp. 9 & n.10), but they contend that this case is not controlled by that ruling because this suit "was not brought by a single disgruntled individual or corporation complaining about an individual enforcement decision made by petitioners" (*id.* at 9). Respondents argue that their complaint stands on a different footing because it alleges a "long-standing and consistent refusal to carry out *any* of [petitioners'] constitutional and statutory civil rights enforcement obligations" (*id.* at 10). Respondents' proposed distinction is unpersuasive and reflects a misunderstanding of the way in which prosecutorial and civil enforcement decisions routinely are made.

It is obviously true that prosecutors are repeatedly faced with the need to determine whether a particular suspect should be prosecuted and, if so, for what offense. They are also frequently confronted, however, with broader questions that involve more than a single case. They must decide how to expend scarce resources, how to divide enforcement responsibilities with prosecutors in other jurisdictions, and how best to achieve overall law enforcement goals. A federal prosecutor might decide, for example, generally to leave unarmed bank robbery prosecutions to the local district attorney, in order to conserve the scarce resources of the United States Attorney's office for matters thought more demanding of its attention. Similarly, a prosecutor might decide not to pursue cases in which a suspect is charged with the possession of a small amount of marijuana or obscene materials, on the theory that more important law enforcement objectives should not be sacrificed in favor of numerous prosecutions for a relatively minor offense. See,

e.g., *Thompson* v. *United States*, 444 U.S. 248, 250 (1980); *Rinaldi* v. *United States*, 434 U.S. 22, 24 n.5 (1977); *Redmond* v. *United States*, 384 U.S. 264, 265 (1966).

Under respondents' apparent conception of the prosecutorial immunity recognized in *Economou* and *Imbler*, decisions such as these presumably would not be entitled to protection, because their application extends more widely than to a single case. But decisions of this kind are essential to a prosecutor's effective performance of his task, and the need for full immunity from personal damages liability is at least as great in this context as it is in the heat of a trial. For similar reasons, petitioners' alleged decisions regarding the general efficacy or desirability of fund termination proceedings as a primary means of combating discrimination are entitled to absolute protection from damages liability. Respondents cannot avoid the dispositive significance of *Economou* and *Imbler* simply by arguing that the prosecutorial actions in dispute here affected more persons than the particular conduct challenged in the earlier cases.

C. The uncontradicted record evidence of petitioners' various responsibilities in the LEAA enforcement process confirms the entitlement to immunity that is evident on the face of respondents' complaint.

1. *Rice.* Petitioner Rice was the Director of the LEAA Office of Civil Rights Compliance. The Administrator delegated to Rice the responsibility for ensuring that recipients of LEAA funds complied with applicable civil rights provisions. In the exercise of that authority, Rice was responsible for developing programs and procedures for enforcement, investigating discrimination complaints filed against recipient agencies, negotiating to achieve voluntary compliance, assisting in the preparation of compliance cases, and recommending the imposition of sanctions, if necessary (J.A. 262-263, 244-245). He also conducted compliance reviews of the employment practices of recipient agencies, and he monitored existing

voluntary compliance agreements to assure continuing compliance by the agencies involved. In short, Rice was the official who, on a day-to-day basis, made the discretionary judgments in LEAA's civil rights compliance program. His functions were unquestionably analogous to those of a prosecutor "in deciding whether a proceeding should be brought and what sanctions should be sought." *Butz* v. *Economou*, *supra*, 438 U.S. at 515. Accordingly, like a United States Attorney or an Assistant United States Attorney, he is absolutely immune from personal damages liability based on his prosecutorial decisions or recommendations.

2. *Work.* Petitioner Work was LEAA's Deputy Administrator for Administration. His uncontradicted affidavit establishes that his only direct involvement in LEAA's civil rights compliance efforts occurred in the case involving respondent Brace. Immediate action was required to insure that Officer Brace would not be dismissed from the Philadelphia Police Department. Work, who knew the Assistant Attorney General of the Civil Rights Division personally, relayed to him a request that the Division take action (J.A. 253). Work subsequently notified Philadelphia officials on behalf of LEAA that further grant requests would not be approved until LEAA was assured that Officer Brace had been permanently restored to duty (*ibid.*). To the extent Work was involved at all in the activities of which respondents complain, it was in the initiation of legal action against the Philadelphia Police Department in the *Brace* case and in the resolution of that controversy. His conduct was like that of a prosecutor in beginning a prosecution and subsequently resolving the charges brought. He is therefore entitled to absolute immunity from this suit.

3. *Velde.* Petitioner Velde, then Administrator of LEAA, delegated the day-to-day responsibility for civil rights compliance to the Director of the Office of Civil Rights Compliance (J.A. 236-237, 244-246). However, he retained responsibility for the basic policy and direction LEAA would pursue to meet its civil rights obligations.

This policy is described in detail in the "Statement of Reasons" incorporated by reference in Velde's affidavit in the district court (J.A. 243, 265-303). Velde directed the development of a Master Plan and Statement of Priorities for civil rights compliance, which became final, after opportunity for comment, in February 1976. In addition, Velde was asked occasionally to take action personally in pending cases by informing the recipient agencies involved of their alleged non-compliance and by attempting to achieve voluntary compliance as an alternative to administrative action to terminate funding (J.A. 238, 241-243). The record thus establishes that, when Administrator Velde took direct action in civil rights matters, he sought to obtain compliance with the Act's antidiscrimination provisions and, in his supervisory capacity, he set the policy for those involved in day-to-day compliance efforts to follow. He acted, in other words, in a prosecutorial role, establishing general enforcement policy and implementing that policy in specific cases. He is therefore entitled to absolute immunity from respondents' claim for damages.

4. *Levi.* Petitioner Levi, then the Attorney General, exercised only powers of general policy guidance and review over LEAA. He was not ordinarily involved in the details of the grant process, and he did not exercise day-to-day supervision over LEAA operations (J.A. at 247-248). In his general policy guidance role, he followed an overall compliance policy that was consistent with the Act and that sought to encourage voluntary compliance as an alternative preferable to funding termination (J.A. 248). In addition, as part of the Justice Department's efforts to secure compliance with antidiscrimination provisions, the Civil Rights Division sought judicial remedies against some recipient agencies alleged to have engaged in discriminatory employment practices, and the Attorney General was aware of these efforts (J.A. 249-250). Accordingly, to the extent that he was involved at all in the matters treated in the complaint, Attorney Gen-

eral Levi provided guidance on enforcement policy and used alternative judicial remedies to achieve compliance. With respect to both of these roles, he is entitled to absolute immunity.

In their various capacities, petitioners unquestionably performed functions analogous to those of prosecutors in determining how to enforce LEAA's civil rights requirements. They determined policy regarding compliance and enforcement and, consistent with their respective roles, applied that policy to individual cases. The involvement of each petitioner was identical in kind and degree to one or more of the tasks typically performed by prosecutors in determining which cases to pursue and how to pursue them. Accordingly, petitioners are entitled to absolute immunity from personal damages liability based on the exercise of their administrative law enforcement responsibilities. *Butz* v. *Economou*, *supra*; *Imbler* v. *Pachtman*, *supra*.

II. PETITIONERS' FAILURE TO TERMINATE FEDERAL FUNDING TO LOCAL GOVERNMENT AGENCIES THAT ALLEGEDLY DISCRIMINATE ON THE BASIS OF RACE AND GENDER DOES NOT GIVE RISE TO A CAUSE OF ACTION FOR DAMAGES UNDER THE FIFTH AMENDMENT

At its core, respondents' complaint attacks alleged unlawful discrimination in federally funded law enforcement programs (J.A. 26-41). Respondents do not contend, however, that petitioners practiced this discrimination. Instead, respondents argue that petitioners violated their rights under the Due Process Clause of the Fifth Amendment by failing to terminate funding to recipient state law enforcement agencies that petitioners allegedly knew discriminated on the basis of race and sex. Respondents ask that petitioners be found personally liable for compensatory and punitive damages because of their failure to terminate this funding.

The Due Process Clause of the Fifth Amendment unquestionably plays a substantial role in restricting the circumstances in which the federal government may legitimately employ race- or gender-based distinctions in allocating social or economic benefits. See, *e.g.*, *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). And this Court has established that in some situations the Constitution affords victims a damages remedy against federal officials who purposefully discriminate. *Davis* v. *Passman*, 442 U.S. 228 (1979); cf. *Carlson* v. *Green*, 446 U.S. 14 (1980). Respondents, however, have not alleged that petitioners purposefully discriminated against them. On the contrary, the complaint asserts that any discrimination against respondents originated without petitioners' involvement and continued despite efforts by petitioners to eliminate it. The mere allegation that those efforts did not take the form and were not as efficacious as respondents would have liked does not state a claim on which damages liability under the Fifth Amendment may be predicated.[20]

A. The Complaint Does Not Allege and the Record Does Not Indicate That Petitioners Purposefully Discriminated

A showing that official government action has had a discriminatory effect or impact is not sufficient to establish a violation of the Due Process Clause of the Fifth Amendment. There must, in addition, be proof that the official action had an invidiously discriminatory purpose. *City of Memphis* v. *Greene*, No. 79-1176 (Apr. 20, 1981), slip op. 19; *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 273-281 (1979); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*,

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[20] This argument was raised by petitioners in the district court and in the supplemental brief and rehearing petition in the court of appeals. Neither court addressed it, however.

429 U.S. 252, 264-265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 239-241 (1976). "'Discriminatory purpose' * * * implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker * * * selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 279 (citation and footnote omitted). In the present case, the complaint does not allege and the record, including the uncontradicted affidavits, does not reveal the requisite purposeful discrimination.

According to respondents' own theory, the state and local law enforcement agencies that received LEAA funds, not petitioners, practiced illegal discrimination. The complaint alleges only that petitioners failed to terminate federal funding to agencies that they knew were discriminating. But there is no suggestion in the complaint or the record that petitioners controlled or otherwise directly influenced the employment practices of the recipient agencies. Moreover, respondents do not allege that petitioners required, encouraged, aided, or affirmatively approved the discriminatory behavior of the recipient agencies. Rather, the record shows, and respondents do not dispute, that petitioners took extensive actions short of formal enforcement proceedings to promote nondiscrimination by recipient agencies.

The complaint itself details petitioners' extensive efforts to secure compliance with the governing antidiscrimination laws. See, *e.g.*, Complaint ¶¶ 47, 76, 82, 89, 102 (J.A. 27, 34-36, 38, 41). These actions included compliance reviews, initial determinations that recipients were not in compliance, investigations of individual charges, and directives to recipient agencies demanding compliance with nondiscrimination requirements. The uncontradicted affidavits filed by petitioners in this case also demonstrate that petitioners made numerous attempts to assure that recipients of LEAA funds did not discriminate. See, *e.g.*,

Velde Affidavit ¶¶ 6-21 (J.A. 237-243). Respondents' essential contention, therefore, is that petitioners' attempts to obtain compliance were inadequate and that the failure to terminate federal funding had the effect of perpetuating local discrimination. Even if this doubtful assertion is adequately alleged (see pages 31-39, *infra*), it is insufficient to establish a claim for relief under the Fifth Amendment. The complaint and record facts, taken as true, do not establish that the LEAA funding was continued " 'because of,' [and] not merely 'in spite of,' its adverse effects upon [respondents]."[21] *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 279. For this reason, respondents would not be entitled to relief even if they could prove their allegations.

B. The Complaint Fails To Allege Sufficient LEAA Involvement To Establish That Continuation Of Federal Funding Had The Effect Of Injuring Respondents

The complaint also fails to state a claim on which relief can be granted because it does not allege an adequate causal connection between petitioners' actions and respondents' injury. Respondents essentially claim that by failing to initiate fund termination proceedings against

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[21] The only suggestion in the 36-page complaint that petitioners' actions were improperly motivated appears not in the numbered paragraphs setting forth respondents' factual allegations and their supposed causes of action but rather in the concluding "Prayer for Relief." As part of their request for damages, respondents make the bald assertion that petitioners' failure to act was "malicious." Such a conclusory term, which is inconsistent with petitioners' undisputed actions and is not supported by any allegations of fact, should not be enough to require the Attorney General and his subordinates to endure a trial for damages. Cf. *Butz* v. *Economou*, *supra*, 438 U.S. at 507-508 ("Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss").

recipient agencies that discriminate, petitioners themselves became responsible for the discrimination and may be held liable in damages. But this Court's decisions establish that petitioners must be personally responsible or affirmatively involved in the allegedly unconstitutional behavior before they may be found liable for it. See *Martinez* v. *California*, 444 U.S. 277, 285 (1980); *Rizzo* v. *Goode*, 423 U.S. 362, 377 (1976).[22]

In order for liability to attach, the chain of causation from petitioners' involvement to respondents' injuries must be concrete and direct. See, *e.g.*, *Martinez* v. *California*, *supra*; *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Rizzo* v. *Goode*, *supra*; *Warth* v. *Seldin*, 422 U.S. 490 (1976); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972). Respondents must show that they have "suffered some actual or threatened injury *as a result of* the putatively illegal conduct of the" petitioners. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979). If the chain of causation is based on speculative inferences and the injury is a "remote consequence" of petitioners' action, the claim must be dismissed. Because respondents' injuries in this case cannot be "fairly traced" to any involvement by petitioners, and because it would be mere speculation to conclude that the termination of funding would have remedied the discrimination respondents allegedly have suffered, the complaint fails to state a claim for damages relief under the Fifth Amendment.

In *Martinez* v. *California*, *supra*, for example, a convicted felon committed a murder soon after his release from prison on parole. Although the parole officers' de-

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[22] Accord, *Maioranna* v. *MacDonald*, 596 F.2d 1072, 1077-1078 (1st Cir. 1979); *Kostka* v. *Hogg*, 560 F.2d 37, 40 (1st Cir. 1977); *Palmer* v. *Hall*, 517 F.2d 705, 708-709 (5th Cir. 1975); *Sostre* v. *McGinnis*, 442 F.2d 178, 189-190 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049, 405 U.S. 978 (1972); *Davis* v. *Casey*, 493 F. Supp. 117, 120 (D. Mass. 1980); *Simms* v. *Reiner*, 419 F. Supp. 468, 474-475 (N.D. Ill. 1976); *Richardson* v. *Snow*, 340 F. Supp. 1261, 1262-1263 (D. Md. 1972).

termination to release the felon was in some sense a cause of the decedent's death, this Court unanimously concluded that the murder was "too remote a consequence of the parole officers' action to hold them responsible" under the Due Process Clause of the Fourteenth Amendment (444 U.S. at 285). The parole officers did not have sufficient personal involvement in the crime that took the victim's life.[28]

Similarly, in *Rizzo* v. *Goode*, *supra*, a group of citizens of Philadelphia claimed that city police officers engaged in a "pervasive pattern of illegal and unconstitutional mistreatment" (423 U.S. at 366). The suit charged the Police Commissioner and the Mayor with conduct ranging from express authorization of this mistreatment to the "failure to act in a manner so as to assure that it would not recur in the future." *Id.* at 367. The suit did not name as defendants the group of police officers principally involved in the illegal incidents; it attempted only to hold the top administrative officials liable. *Ibid.* Emphasizing the district court's finding that the conduct of the Mayor and the Police Commissioner had played "no affirmative part" in the line officers' allegedly unconstitutional behavior, the Court reversed the grant of an injunction issued against those defendants. *Id.* at 377. The Court held that the Mayor and Police Commissioner were not responsible for the unconstitutional actions, even though their failure to change police disciplinary procedures allegedly meant that the unconstitutional behavior was likely to recur. *Id.* at 371. The Court simply found the causal connection between the asserted constitutional injury and the defendants' involvement too attenuated to support judicial intervention under 42 U.S.C. 1983. Accord, *Palmer* v. *Hall*, *supra*, 517 F.2d at 708-709 (Mayor's order to "shoot to kill" persons involved in violent crime

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[28] The Court contrasted the situation with *"Screws* v. *United States*, 325 U.S. 91, where local law enforcement officials themselves beat a citizen to death." *Martinez* v. *California*, *supra*, 444 U.S. at 285 n.19.

did not cause police officer's wrongful shooting of fleeing misdemeanant).

Simon v. *Eastern Kentucky Welfare Rights Organization, supra, Warth* v. *Seldin, supra,* and *Linda R.S.* v. *Richard D.,* 410 U.S. 614 (1973), although addressed to the closely related question of standing to sue, also support the conclusion that the alleged chain of causation in this case is too attenuated to withstand a motion to dismiss. In *Eastern Kentucky,* several indigents and organizations composed of indigents sued the Secretary of the Treasury and the Commissioner of Internal Revenue, claiming that a new IRS Revenue Ruling violated the Internal Revenue Code by allowing favorable tax treatment to a nonprofit hospital that offered no services other than emergency room care to indigents. This ruling, the complaint alleged, encouraged hospitals to deny services to indigents. 426 U.S. at 42. In dismissing the complaint, this Court stated (*id.* at 42-43):

> [I]t does not follow * * * that the denial of access to hospital services in fact results from petitioners' new Ruling, or that a court-ordered return by petitioners to their previous policy [which would not have permitted preferred tax status to the hospitals involved] would result in these respondents' receiving the hospital services they desire. It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' "encouragement" or instead result from decisions made by the hospitals without regard to the tax implications.

See also *Warth* v. *Seldin, supra,* 422 U.S. at 503-508 (record devoid of necessary factual allegations from which a court could infer that, in the absence of defendants' restrictive zoning practices, plaintiffs' asserted injury probably would be remedied); *Linda R.S.* v. *Richard D., supra,* 410 U.S. at 618 (plaintiff's injury only speculatively traceable to challenged inaction by defendant prosecutor).

Here, it cannot be maintained that the employment discrimination allegedly practiced by recipient agencies "in fact" resulted from the continued LEAA funding—indeed, by respondents' own assertions the discrimination long predated the LEAA—or that the recipient agencies would necessarily have stopped discriminating if LEAA funding had been terminated.[24] Rather, even assuming that petitioners' initiation of fund termination proceedings would actually have resulted in the cutoff of funds, independent action by third parties (the recipient agencies) still would have been required before the injuries respondents allegedly sustained would have been remedied. In light of the limited contribution made by LEAA funds to the overall operation of local police departments, the recipient agencies might well have failed to remedy their allegedly discriminatory practices even if LEAA funds had been terminated. In 1974, for example, the LEAA grant to the Phiadelphia Police Department represented less than 1% of the Department's budget (see note 2, *supra*). When this fact is considered together with the Department's resistance to petitioners' other efforts to secure compliance with the statutory nondiscrimination provisions (see Complaint ¶ 47 (J.A. 27)), there is little likelihood that funding termination would have had the desired effect on the discriminatory behavior of that agency. As in *Martinez*, *Rizzo*, and *Eastern Kentucky*, respondents' injury is at most a "remote consequence" of petitioners' actions and "[i]t is purely speculative whether [the discrimination] specified in the complaint fairly can be traced to [petitioners' financial support] or instead result[ed] from decisions made by [the re-

[24] Respondents cannot successfully premise their constitutional cause of action on the fact that petitioners failed to halt funding to some local police departments that were unlawfully discriminating. The critical inquiry is whether the uninterrupted LEAA funding itself had the purpose and effect of discriminating against respondents. Respondents' failure to describe the way in which petitioners' alleged omissions caused an injury they otherwise would not have suffered is fatal to the claim for damages.

cipient agencies]." *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra*, 426 U.S. at 42-43. Hence, respondents' complaint does not allege a connection between their injury and petitioners' actions sufficient to withstand a motion to dismiss and to force the former Attorney General and his subordinates to undergo the burden of a trial.

Our contention is further supported by analogy to this Court's "state action" decisions under the Fourteenth Amendment. See, *e.g.*, *Flagg Bros.* v. *Brooks*, 436 U.S. 149 (1978); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). These cases show that minor governmental supervision, regulation, or even conferral of benefits does not imbue private conduct with the character of governmental action and certainly does not automatically render a state or municipality or one of its agencies or officials responsible for the conduct of private parties.[25] In the absence of purposeful causation or affirmative encouragement, state involvement does not subject private parties to the strictures of the Fourteenth Amendment. See, *e.g.*, *Moose Lodge No. 107* v. *Irvis*, *supra*, 407 U.S. at 176-177 (state regulation of liquor licenses, though highly detailed, does not "foster or encourage racial discrimination" and therefore "does

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[25] In the "state action" cases, the issue was whether the state was sufficiently involved in a private actor's allegedly illegal conduct so that the plaintiff could invoke the protections of the Fourteenth Amendment against the private individual's action. The issue was not, as it is here, whether the state, or one or more of its officials, could be held liable for the illegal conduct of the private actor. The "state action" cases are nevertheless informative as illustrations of the principle that minimal governmental involvement in actions of third parties does not bring constitutional constraints into play.

not sufficiently implicate the State" in a licensee's discriminatory practices to make the latter "state action").

Even less so should the mere continuation of federal funding—funding that constitutes an insignificant percentage of a state or local agency's total annual budget—subject LEAA officials to personal liability for the transgressions of the grant recipient. "Grants of federal funds generally do not create a partnership or joint venture with the recipient, nor do they serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision." *Forsham* v. *Harris*, 445 U.S. 169, 180 (1980). See also *United States* v. *Orleans*, 425 U.S. 807, 818 (1976). Here, the recipient agency's allegedly discriminatory actions were not endorsed, approved, or induced by petitioners but in fact, according to respondents' own allegations, were undertaken and continued in direct contravention of petitioners' directives and compliance efforts. This argument would remain controlling even if the statutory provisions on which respondents rely, Sections 509 and 518(c) of the Act as amended in 1973, reposed substantially less discretion in the hands of the officials responsible for administering the LEAA grant program. Without some more direct allegation and showing that the asserted failure by petitioners to perform their statutory duty regarding fund termination caused respondents some actual constitutional injury (see note 26, *infra*) that otherwise would not have occurred, respondents would still fail to state a claim on which liability for damages could properly be based. Not every departure by a federal officer from a statutory command subjects him under the Constitution to liability to those persons who are dissatisfied with his performance. However serious may be the alleged dereliction of duty, damages may not be recovered under the Fifth Amendment unless a litigant alleges and proves a direct causal connection between the wrongful official omission and some discrete deprivation of constitutional rights that the litigant has suffered.

The First Circuit recently applied these principles in a context closely related to the present situation. In *Francis-Sobel* v. *University of Maine*, 597 F. 2d 15 (1st Cir.), cert. denied, 444 U.S. 949 (1979), the court of appeals affirmed the dismissal of a damages claim against an EEOC official for allegedly failing to handle properly the plaintiff's discrimination complaint against a state university. The court explained (597 F. 2d at 18):

> Nor do we think that even arbitrary and capricious denial of the investigative and conciliatory benefits the EEOC can provide to a charging party transgresses the Due Process Clause in a way that would support the implication of a damage remedy. Unlike *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 * * * (1971), this case involves the loss of alleged statutory rights to administrative assistance in the vindication of underlying, fundamental statutory and constitutional interests. The interests themselves have not been lost, only the help that Congress intended charging parties receive in vindicating those rights. We think that such statutory rights, if they be "liberty or property" at all within the meaning of the Due Process Clause, are so tangential to [plaintiffs' underlying rights] * * * that an implied right of action [under the Constitution] cannot and should not be found here. Indeed, were we to find that the right to EEOC assistance is protected by an implied right of action found in the Fifth Amendment, then every federal bureaucrat would be subject to judicial review of the most minute aspects of his responsibilities as they affect members of the public.

By contrast to this reasoning, the decision of the court of appeals now under review would subject federal officials who supervise federal funding programs to personal damages liability for the discriminatory acts of grantee state and local governments, even though the federal officials were not responsible for the discrimination and even though the victims of such discrimination have fully ade-

quate remedies against the recipients of federal funds. See *Owen* v. *City of Independence, Missouri*, 445 U.S. 622 (1980); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); 42 U.S.C. 1983, 2000e, 3766(c)(4)(A). Cf. *Parratt* v. *Taylor*, No. 79-1734 (May 18, 1981); *Carlson* v. *Green*, *supra*.[26] The Fifth Amendment does not authorize a constitutional cause of action for damages in these circumstances.

III. PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW

As we have shown above, the judgment of the court of appeals should be reversed on the grounds of absolute immunity and respondents' failure to state a claim on which relief can be granted. Regardless of these contentions, however, petitioners should prevail in this case because they are entitled to qualified immunity as a matter of law. Government officials are entitled to qualified

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[26] We do not understand respondents to assert any statutory right to a damages recovery from petitioners. In any event, such a claim is plainly not available. Section 518 of the Act does not expressly provide respondents with a private cause of action against petitioners in their individual capacities. Whether the statute nonetheless implicitly creates a private cause of action is purely a question of congressional intent. *Universities Research Ass'n* v. *Coutu*, No. 78-1945 (Apr. 6, 1981); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979). Nothing in the language or the legislative history of the Act suggests even remotely that Congress intended to permit private damage claims against the federal officials who administered the LEAA program. In fact, in 1976 Congress amended the Act to create a private remedy against LEAA funding recipients that discriminate illegally. 42 U.S.C. 3766(c)(4)(A). The amendment was unaccompanied by any indication that Congress intended to authorize similar private actions against LEAA officials who did not act swiftly or effectively enough to end discrimination by recipient agencies. Accordingly, no private cause of action against the officials who administered the LEAA statute is implicit in the Act. See, *e.g.*, *California* v. *Sierra Club*, No. 79-1252 (Apr. 28, 1981); *Universities Research Ass'n* v. *Coutu*, *supra*; *Touche Ross & Co.* v. *Redington*, *supra*.

immunity when they act in a reasonable, good-faith belief that their actions are lawful. *Butz* v. *Economou*, *supra*, 438 U.S. at 507; *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-248 (1974). The pleadings and accompanying affidavits in the record demonstrate that petitioners sought to enforce the antidiscrimination provisions in the Act and that they could not possibly have known that their failure to initiate funding termination proceedings violated respondents' Fifth Amendment rights. Accordingly, petitioners are entitled to a summary disposition in their favor.

No decision of this Court or of any court of appeals has previously suggested that the mere failure to terminate federal funding gives rise to a cause of action for damages under the Due Process Clause. Indeed, in 1975, when petitioners' allegedly tortious conduct occurred, it was far from clear whether many of the alleged discriminatory practices of grant recipients even amounted to a violation of equal protection principles. For example, the use of height and weight requirements and written examinations by local police departments raised legal questions that at the time were rapidly developing and largely unsettled. See, *e.g.*, *Washington* v. *Davis*, *supra*; *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977). Because petitioners thus had no reason to believe that their actions were violating "clearly established" constitutional rights, and because a government official is not " 'charged with predicting the future course of constitutional law' " (*Wood* v. *Strickland*, 420 U.S. 308, 322 (1975), quoting *Pierson* v. *Ray*, *supra*, 386 U.S. at 557), respondents' claim for damages should have been dismissed. See, *e.g.*, *Butz* v. *Economou*, *supra*, 438 U.S. at 507-508; *Procunier* v. *Navarette*, 434 U.S. 555, 564-566 (1978); *Wood* v. *Strickland*, *supra*, 420 U.S. at 321-322. See also *Trapnell* v. *Riggsby*, 622 F.2d 290, 295-296 (7th Cir. 1980); *Douthit* v. *Jones*, 619 F.2d 527, 534 (5th Cir. 1980); *Atcherson* v. *Siebenmann*, 605 F.2d 1058, 1063-1067 (8th Cir. 1979).

In response to the statement in the petition (Pet. 21 n. 20) that nothing in the complaint or the record suggests that petitioners' failure to act was motivated by bad faith, respondents point (Br. in Opp. 8 n.9) to the single sentence in the complaint's "Prayer for Relief" in which they characterize petitioners' conduct as "willful and malicious." Such conclusory and unsupported name-calling, however, cannot substitute for factual allegations that, if true, would support a finding that petitioners acted without a reasonable, good-faith belief in the lawfulness of their conduct. Respondents also maintain (Br. in Opp. 12 n.13, 15 n.15) that petitioners violated Section 518(c) of the Act by relying on compliance methods other than funding termination and that this statutory violation is sufficient to support their constitutional damage claim. But, as we have already argued, petitioners' compliance efforts were not inconsistent with the Act as a matter of law. And, even if they were, this would not establish that petitioners knew that the failure to terminate funding to allegedly discriminating agencies violated the Act, much less that it violated respondents' *constitutional* rights. See also note 39, *supra*. Respondents simply have not made a single factual assertion that would tend to explain how petitioners conceivably could have known that their civil rights enforcement efforts deprived respondents of due process in violation of the Fifth Amendment.

Moreover, the uncontradicted affidavits filed by petitioners and the Statement of Reasons prepared by petitioner Velde (see page 27, *supra*), which outlines in detail the nature and extent of the LEAA efforts to obtain compliance with the Act's antidiscrimination provisions, negate any possibility that petitioners acted unreasonably or with the intent to deny respondents their constitutional rights. Petitioner Velde's Statement of Reasons describes the origins and distribution of the LEAA Equal Employment Opportunity Program Development Manual, the drafting of a Master Plan and State-

ment of Priorities for LEAA's compliance program, the convening of conferences on the employment of women and minorities in law enforcement jobs, and the creation of the position of Special Assistant to the Administrator to help coordinate LEAA compliance efforts. The Statement explains (J.A. 281-282; emphasis in original):

> In recognition of the practical limitations on investigating every possible violation by every recipient criminal justice agency, LEAA has continually increased its monitoring of the civil rights responsibilities of recipient agencies through training, technical assistance and programmatic requirements designed to educate, assist and require a self-evaluation by these agencies. The question is not *whether* to effect civil rights compliance, but *how* to *best* accomplish it.

The Statement of Reasons then describes the creation, organization, and staffing of the LEAA Office of Civil Rights Compliance. The Office was established in 1971 and its staff for fiscal year 1974 consisted of 12 professionals and three clerical workers. The number of professionals on the staff increased to 16 in fiscal year 1975. The Office was divided into a Complaints Division, a Compliance Review Division, and a Contract Compliance Division. The Statement of Reasons explains the operation of these divisions and provides statistical information concerning the office's activities during the fiscal years involved in respondents' complaint.

Petitioner Velde's report also includes a listing of significant LEAA grants and contracts designed to improve civil rights compliance capabilities (see J.A. 291-294). The Statement of Reasons stresses that "[t]he primary purpose of civil rights law is to establish equal opportunity, not to withhold Federal assistance" (J.A. 294). For that reason, the Statement announces (*ibid.*): "LEAA is firmly committed to the principle that the initial step in the resolution of civil rights compliance problems must be a serious attempt to achieve a voluntary settlement."

Finally, the Statement addresses respondents' contentions and explains the legal and practical problems with the immediate funding terminations that respondents demand (J.A. 296-302). The appendix to the Statement of Reasons contains a detailed description of the application of LEAA's antidiscrimination compliance policies in connection with several particular recipient agencies, including those mentioned in respondents' complaint.

Respondents have not disputed any of the factual representations made in the Statement of Reasons and its Appendix. Respondents apparently concede, and in any event the record establishes, that LEAA and petitioners made extensive efforts to enforce the Act's antidiscrimination provisions, both through attempting to obtain voluntary compliance and through litigation. In light of respondents' failure to allege any facts suggesting petitioners' bad faith, and in light of their further failure to deny that petitioners devoted substantial energies to civil rights enforcement, the only conclusion that can be supported by the record is that petitioners acted reasonably and in good faith in attempting enforcement measures before considering whether to resort to funding termination. See *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 44.

In *Butz* v. *Economou*, *supra*, this Court expressed confidence that "[i]nsubstantial lawsuits [against federal officials] can be quickly terminated by federal courts alert to the possibilities of artful pleading" (438 U.S. at 507). In addition, the Court reiterated the view, stated earlier in *Scheuer* v. *Rhodes*, *supra*, that "damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity" (438 U.S. at 508). This case tests the effectiveness of those assurances. If ever a constitutional tort suit against federal officials deserved to be resolved summarily, this is the one—yet it has now been pending for more than five years. Respondents' extrava-

gant charges should not be permitted to force petitioners, including the former Attorney General, to undergo the expense and burden of a trial. Even if petitioners ultimately prevail, the prospect of defending such lawsuits in the future can hardly fail to "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). See *Hanrahan* v. *Hampton*, 446 U.S. 754, 765 (1980) (Powell, J., dissenting from the denial of certiorari). The complaint and record leave no doubt that petitioners acted reasonably and in good faith. At a minimum, therefore, they are entitled to qualified immunity as a matter of law.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it reinstates respondents' claim for damages and remands for further proceedings on that claim.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

PETER BUSCEMI
Assistant to the Solicitor General

ROBERT E. KOPP
BARBARA L. HERWIG
FREDERICK GEILFUSS
Attorneys

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